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IN THE

Supreme Court of the United States,

OCTOBER TERM—1937.

No. 367.

ERIE RAILROAD COMPANY, (a New York corporation),

Petitioner,

against

HARRY J. TOMPKINS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF ON BEHALF OF PETITIONER ERIE RAILROAD COMPANY.

WILLIAM C. CANNON,
THEODORE KIENDL,
HAROLD W. BISSELL,
Counsel for Petitioner.

THE BALLOU PRESS NEW YORK

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In the

Supreme Court of the United States,

October Term—1937.

Erie Railroad Company (a New York corporation), Petitioner, against Harry J. Tompkins, Respondent.	No. 367.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

REPLY BRIEF ON BEHALF OF PETITIONER ERIE RAILROAD COMPANY.

As to the Facts.

It seems desirable to deal briefly with certain differences in the statements of facts in the main briefs.

In our brief (p. 5) we stated that the plaintiff could have reached his home without inconvenience by the regular public thoroughfares (citing pp. 27, 59-61 of the Record). The plaintiff's brief states that the route taken by plaintiff "was the shortest and most direct route to his home" (Br., p. 2). Our citations, together with plaintiff's Exhibit 1 (cited by Pltf.) show conclusively that plaintiff would have taken the shortest and most direct route, as well as the safe route to his home, by leaving the automobile at the intersection of

his distance from the train (Br., p. 3), placing the longitudinal path "2 to 2½ feet from the ties" and widening the path (contrary to the evidence as above noted) "to about 4 feet." It may be observed that the net result of applying these favorable inferences would be to place the plaintiff beyond the reach of the alleged swinging door which, according to his testimony (R., p. 65), projected two feet from the side of the car.

In our brief (pp. 5-7) we disclosed the vagueness and inconsistency of plaintiff's testimony that he was hit by a "black object that looked like a door" to him; and it is to be noted that the jury was permitted to find for plaintiff only upon finding that plaintiff was "struck by the door of a freight car" (R. p. 350). Plaintiff's testimony was that he was struck after "a few cars" had passed him (R. p. 50); plaintiff's verified bill of discovery stated that plaintiff was struck by a projection from "either the third or fourth car" of the train (R. p. 8) and the proposed interrogatories thereunder related only to the first four cars (R. p. 11); and the plaintiff's bill of particulars stated that "the projection extended from one of the cars immediately following the engine" (R. p. 15). The uncontroverted evidence was that the only cars in the train having hinged doors such as might meet plaintiff's description of the object which struck him were three refrigerator cars.

With this background, plaintiff's brief makes a patent attempt to indicate that the fourth car was a refrigerator car (Br., p. 2) and follows this with a statement that defendant's witnesses "clearly attempted to conceal the true order of the cars on the train" (Br., p. 4). The uncontroverted evidence was that the refrigerator car to which plaintiff's brief refers was the 17th car from the rear or the 22nd car from the head of the 38-car train, and that the refrigerator car nearest the engine was the 15th car (R. pp. 187-9). The statement that the defendant's witnesses attempted to conceal the true order of the cars is inexcusable. The only basis for the statement is the difference in the order of listing the

cars in defendant's Exhibits E and F and plaintiff's Exhibit 7. The differences were carefully accounted for by defendant's witnesses on direct examination. Thus, it was voluntarily explained that Exhibit E records an inspection in which the inspector started forward from the 14th car from the rear and went completely around the train in making his inspection (R., pp. 181-191), that Exhibit F listed the cars from head to rear (pp. 191-2), and that Exhibit 7 listed them from rear[1] to head (R., pp. 282-3, 312-3, 323). An examination of the exhibits readily confirms this testimony.

Plaintiff's brief conveys the false impression that two cars, on the wheels of which blood stains were found, formed a part of the train and were improperly omitted from these lists (Br., p. 4, referring to R. p. 255). The undisputed evidence was that the inspection which resulted in the finding of blood stains was made at Penobscot, some hours after the accident, after the train had been delivered to the Central Railroad of New Jersey at Ashley and "broken up" and after some of the cars had been moved on to Penobscot, that the inspection was made by an inspector of that road, that the inspection included some cars which were never a part of the train in question, that blood stains (which may or may not have been human) were found on seven enumerated cars of which the first and third had not formed a part of the train in question, and that five of the cars with blood stains had been a part of the train (R., pp. 249-256). By reference to defendant's Exhibit F, it will be seen that the cars with blood stains were the 4th, 7th, 8th, 13th and 16th cars of the train in question, counting from the head of the train.[2]

Thus, the testimony to which plaintiff's brief refers furnishes absolutely no evidence whatever of any attempt of defendant at concealment. But it is interesting to note that, if the blood on the Erie cars was that of the plaintiff as his

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[1] Except that Exhibit 7 does not list three cars added at the rear of the train after the inspection (R. pp. 282-3, 292, 312).

[2] The thirteenth car, PRR 52979, apparently due to typographical error, is given as PRR 52659 at Record, page 255.

brief assumes, the testimony conclusively demonstrates that plaintiff was not struck by a door of the type which he described since the first refrigerator car was the 15th from the head of the train, and it corroborates plaintiff's original position that the car involved in the accident was one of the first four cars. The emptiness of the further charges as to inspection (Pltf.'s Br., pp. 4-5) will be apparent upon examining the plaintiffs own citations to the record.

As to the Pennsylvania Rule as to permissive rights on the right of way.

Plaintiff's brief (pp. 18-23) challenges our analysis of the Pennsylvania cases (Deft.'s Br., pp. 15-22). We believe a reading of the cases will convince the Court of the correctness of our analysis.[1]

Viewing the Pennsylvania decisions with exclusive reference to their specific holdings on the narrow question of permissive rights on longitudinal beaten paths, the plaintiff purports to find that the *Falchetti* case (307 Pa. 203) is an isolated holding and hence not adequate to create an established rule. The Pennsylvania rule is broader in its scope. The rule is that in Pennsylvania a person using a well defined crossing over the tracks is a licensee to whom the railroad owes a duty of due care but that a person walking elsewhere on the general right of way devoted exclusively to the operation of trains (whether on a beaten path or not) is a trespasser to whom the railroad owes no obligation except to refrain from wilful or wanton negligence. In this broad aspect the *Falchetti* case is not an isolated holding but is consistent with and supported by the prior cases reviewed in our main brief and is consistently followed by the later cases.

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[1] We particularly call attention to plaintiff's misstatement of the *Taylor* case (Pltf.'s Br., p. 20), repeated from his brief opposing certiorari, despite our comment thereon (Deft.'s Br., p. 16).

That the broad rule above stated is not a recent departure or an isolated holding is apparent from the following quotation from *Philadelphia etc. R. R. Co.* v. *Hummell*, 44 Pa. 375 (84 Am. Dec. 457) (1863) at page 458:

> "It is time it should be understood in this state that the use of a railroad track, cutting, or embankment, is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it must be so held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries, it is a penal offense to go upon a railroad. With us, if not that, it is a civil wrong of an aggravated nature, for it endangers, not only the trespasser, but all who are passing or transporting along the line. As long ago as 1852, it was said by Judge Gibson, with the concurrence of all the court, that 'a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the highest attainable rate of speed, with which neither the person nor property of another may interfere.'"

Furthermore, the rule in question is by no means confined to Pennsylvania, as shown in the discussion in *Elliott on Railroads*, Third Edition, Sections 1645, 1647, 1785, 1791, 1795.

As to the non-existence of any Federal Common Law.

Plaintiff's brief does not specifically dispute our point (Deft.'s Br., pp. 25-6) that there is no federal common law applicable to such a case as this and that the law to be ascertained is that of the state. We call attention, however, to the following statement in plaintiff's brief (p. 9):

> *"Chesapeake & Ohio R.* v. *Kuhn*, 284 U. S. 44. (Holding in negligence cases arising under Federal Employees' Liability Act 'federal common law' must be followed in preference to contrary state decisions)."

The phrase "federal common law" is a misquotation. The Court stated that in proceedings under the Federal Employer's Liability Act, "wherever brought, the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the federal courts." This, of course, is not a holding that there is a federal common law in any sense here pertinent. As in *Central Vermont Ry.* v. *White,* 238 U. S. 507 (Pltf.'s Br., p. 17), the Court merely held, as a matter of statutory interpretation, that the Federal Employer's Liability Act was presumably written and should be construed in the light of relevant federal court decisions.

As to the extent of the obligation of Federal Courts to follow State Court decisions on matters of State law.

The highest court of Pennsylvania has unequivocally stated the law to be settled in Pennsylvania that permissive rights (while they may be acquired at well defined crossings) may not be acquired along the general right of way devoted exclusively to the operation of trains and that this settled rule is based in part on the public interest in the efficient operation of railroads in Pennsylvania.

It is beyond question that the Pennsylvania rule here invoked by defendant (a) was established to a substantial extent when the accident occurred, and (b) is based to a substantial extent on local considerations. We think it is clear that the state rules which this Court has overridden in its actual holdings, including all of the cases relied upon by plaintiff, have been marked by a distinctly lesser composite degree of local establishment and local considerations.

Swift v. *Tyson,* 41 U. S. (16 Pet.) 1. Question: Is an indorsee a bona fide purchaser where the payee-indorser of a promissory note received it for a past indebtedness? Establishment: The highest court of New York had not passed on the question. Local considerations: None.

Baltimore & Ohio Rd. v. *Baugh*, 149 U. S. 368. Question: Does the assumption of risk doctrine apply to a fireman with respect to acts of the engineer-conductor as a fellow servant? Establishment: The Ohio rule in the negative was deemed established by the Ohio courts though the logic of the rule was doubted by the Ohio courts themselves. Local considerations: None.

Chicago City v. *Robbins*, 67 U. S. (2 Black) 418. Question: Is an independent contractor's failure to guard an excavation a necessary incident to construction work so as to render the owner liable for a consequent injury? Establishment: One isolated Illinois decision under more or less similar circumstances. Local considerations: None.

Gardner v. *Michigan Central Ry.*, 150 U. S. 349. Question: Is plaintiff barred under the assumption of risk doctrine with respect to a hole in a plank left by fellow servants? Establishment: Only one Michigan case seemingly in the affirmative and this Court considered that the case went on another ground. Local considerations: None.

Hough v. *Railway Co.*, 100 U. S. 213. Question: Is a railroad freed of liability under the fellow servant rule where the duty to keep machinery repaired arose on notice to the railroad of defects? Establishment: Two Texas cases cited for the affirmative were deemed by this Court as not so holding. Local considerations: None.

Lake Shore etc. Ry. v. *Prentice*, 147 U. S. 101. Question: May punitive damages be recovered from a railroad on account of wanton acts of the conductor toward a passenger without any showing that the railroad participated in the offense? Establishment: No state decisions (Indiana or Illinois) were asserted; merely a diversity of opinion among the courts of other states. Local considerations: None.

New York Central Railroad Co. v. *Lockwood*, 84 U. S. (17 Wall.) 357. Question: Is a general contract exempting a railroad from negligence with respect to drovers on stock

trains invalid as against public policy? Establishment: The asserted New York holding *(locus contractus)* in the negative rested on a slight majority decision after prior adverse holdings, and was on a *special* contract. Local considerations: None (interstate commerce involved).

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397. Question: May a steamship company make a valid contract exempting itself from liability for negligence in the carriage of goods? Establishment: Apparently established in New York (*locus contractus*). Local considerations: None (injury to goods nearing England).

Beutler v. *Grand Trunk Ry. Co.*, 224 U. S. 85. Question: Is the question as to who are fellow servants a question of fact for the jury? Establishment: An Illinois holding that the question might be left to the jury established no settled rule of property. Local considerations: None.

Baltimore & Ohio R. v. *Goodman*, 275 U. S. 66; *Pokora* v. *New York Central R.*, 292 U. S. 98; *Union Pacific R.* v. *McDonald*, 152 U. S. 262; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. (17 Wall.) 657. No state rule asserted or considered.

Black & White Taxicab Co. v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518. Question: Is a railroad contract giving to a taxicab company exclusive privileges to enter on railroad property to solicit patronage void as tending to monopoly? Establishment: Two Kentucky cases holding the affirmative rested on general reasoning; some distinction from the instant case as to facts shown regarding monopoly. Local considerations: The matter of public policy may be regarded as appropriate in some degree for local determination; but there was no suggestion that the matter was affected by any local conditions in Kentucky.

Olcott v. *Supervisors*, 83 U. S. (16 Wall.) 678. Question: Is a state tax for railroad aid void as not being for a public use? Establishment: One Wisconsin case in the affirmative. Local considerations: No local considerations shown (but

compare *Hairston* v. *Danville & Western Ry.*, 208 U. S. 598, Deft.'s Br., p. 41, holding that what is a public use in condemning for railroad purposes is a local question).

Myrick v. *Michigan Central Ry. Co.*, 107 U. S. 102. Question: Is a railroad deemed to contract for carriage to a destination on a connecting line where it receipts for goods marked for such a destination? Establishment: Illinois cases *(locus contractus)* asserted as holding in the affirmative. Local considerations: None.

As to Plaintiff's Contributory Negligence.

Our objection to the rule of the Circuit Court of Appeals with respect to the question of contributory negligence is not, as the plaintiff seems to assume (Br., p. 32), that that court gave consideration to the cases cited by it as similar. The Circuit Court of Appeals, while deeming the plaintiff's conduct "imprudent," stated that the fact that recoveries had been allowed in the similar cases "indicates that fairminded men may hold a different view," and that this precluded taking the issue from the jury (R., pp. 396-7).

The problem of the Circuit Court of Appeals was to determine whether fairminded men could reach different conclusions as to the existence of contributory negligence in the present case. Of course the *verdicts* in the cited cases, however similar the circumstances, cannot be regarded as indicating that fairminded men might reach different conclusions as to the existence of contributory negligence since that would beg the question. The *allowances of recoveries* in those cases (by permitting the verdicts to stand) presumably indicate that the respective opinions of the particular courts were that fairminded men might reach different conclusions as to the existence of contributory negligence. But, assuming the similarity of the cases, it still remained for the Circuit Court of Appeals to decide whether the opinions were sound. We think it is obvious that the Cir-

cuit Court of Appeals took the short-cut of viewing the cited allowances of recoveries (whether sound or not) as a direct test of the range of fairminded differences.

Certainly, this is an utterly illogical test. We think it is a thoroughly erroneous and dangerous variation from the criterion stated by this Court in the cases cited by the Circuit Court of Appeals (R., p. 397).

Respectfully submitted:

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